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Jurisdiction, Immunity, Legality, and Jus Cogens

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Abstract

Immunities in international law expose multifaceted tensions between goals of international stability and legal accountability. This Article seeks to clarify the law in this area by providing conceptual and doctrinal coherence to relationships between immunity and jurisdiction. It first explains that foreign sovereign immunity and official status-based immunity are jurisdictional in that they block the exercise of adjudicative jurisdiction by foreign states' courts. The Article then explains that these immunities do not block the prescriptive jurisdiction of foreign states' laws to regulate conduct, even conduct inside other states, if a basis of prescriptive jurisdiction exists in international law.

The Article argues that this view of the relationships between immunity and jurisdiction makes sense on, and holds two important consequences for, the current state of the law. First, the relevant law-in-time for gauging these immunities is the law in existence when a court determines whether to entertain suit, not the law in existence at the time of the conduct underlying the suit. As a result, the viability of claims arising out of the same underlying facts changes along with changes in the law of immunity. Second, this view gives the immunity doctrines rule-of-law coherence by avoiding legality problems or retroactive application of the law any time a post-conduct trigger like a waiver or change in status removes immunity.

Last, the Article assesses the law of conduct-based immunity and, in particular, arguments that conduct-based immunity does not attach for violations of jus cogens, *or peremptory norms of international law. Compared with the relatively settled laws of foreign sovereign and status-based immunities, the law of conduct-based immunity is in flux. Because customary international law arises from state practice and* opinio juris, *arguments used to avoid direct collisions between other types of immunity and* jus cogens *do not necessarily extend by analogy to conduct-based immunity, which is its own distinct doctrine under international law. Most prominently, arguments that foreign sovereign and status-based*

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immunities do not come into direct conflict with, and thus do not yield to, jus cogens*—because those immunities address amenability to suit while* jus cogens *address substantive prohibitions under international law—may not apply when the immunity at issue is conduct-based. For instance, conduct-based immunity may be understood as a substantive, as opposed to a jurisdictional, defense on the current state of the law, especially in criminal suits. In which case, conduct-based immunity does come into direct conflict with, and yields to,* jus cogens*. The Article concludes that the present state of flux in the law of conduct-based immunity may also be indicative of immunity norms bending to accountability norms where the law is unsettled.*

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I. INTRODUCTION

The international law of immunity exposes complex conceptual and doctrinal tensions between the sometimes competing goals of international stability and legal accountability. From a real-world litigation standpoint, the nature and scope of immunities under international law have become increasingly contested and central elements in suits around the world.[1] In particular, the push to hold perpetrators of serious violations of international law criminally and civilly accountable in domestic courts has accelerated the need for a clean understanding of both current immunity doctrines and their potential development going forward.

Courts and commentators often describe immunities as "jurisdictional."[2] This Article seeks to clarify relationships between doctrines of immunity and jurisdiction and to chart implications of its argument for less settled areas of the law. It begins by introducing different types of immunity and jurisdiction in international law. Immunity can be divided into three main types: foreign sovereign immunity, which immunizes foreign states as states; official status-based immunity, which immunizes certain high-ranking officials of foreign states; and official conduct-based immunity, which immunizes certain official conduct performed on behalf of foreign states.[3] Jurisdiction can also be divided into three main types: adjudicative jurisdiction, which is the power to subject persons or things to judicial process; prescriptive jurisdiction, which is the power to regulate the conduct of persons or things; and enforcement jurisdiction, which is the power to enforce law as to persons or things.[4]

The Article next explains that foreign sovereign immunity and official status-based immunity are jurisdictional in the sense that they block the exercise of adjudicative jurisdiction by other states—that is, the exercise of jurisdiction by other states' courts. But the Article argues that foreign sovereign and official status-based immunities do not block the exercise of prescriptive jurisdiction by other states—that is, the jurisdiction of other states to regulate conduct or activity underlying a suit, even where that conduct or activity occurs inside the territory of another state.

Two important consequences follow from this jurisdictional understanding. First, the relevant conduct or event to which these immunities apply is not the conduct underlying or giving rise to suit, but rather a court's exercise of

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1 Hazel Fox CMG QC, *The Law of State Immunity* 2–8 (Oxford 2d ed 2008).

2 See, for example, *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belg)* 2002 ICJ 3, 25 at ¶ 60 (Feb 3, 2002). See also Fox, *The Law of State Immunity* at 1 (cited in note 1).

3 See Section II.

4 See Section III.

jurisdiction to entertain that suit. As a result, the applicable law-in-time to gauge immunity claims is the law in existence at the time the court decides whether to entertain suit, not the law in existence at the time of the conduct underlying the suit. This is important because, like all international law, the law of foreign sovereign and official status-based immunities is fluid; it can and has changed over time—indeed, in some respects rather dramatically in recent history[5]—and it is likely to continue to change. Thus, as the Article illustrates, claims that may not have succeeded in the past because they would have run into an immunity blockade may now move forward on the same underlying facts, and vice versa.[6]

The second important consequence of this jurisdictional view is that it reconciles these immunities with legality principles central to the rule of law. In particular, situations in which foreign sovereign and official status-based immunities previously would have blocked proceedings that later may go forward due to a post-conduct rescission of immunity—for example, a waiver of immunity or a lapse in official status—present no retroactivity or legality problems. As long as a basis of prescriptive jurisdiction existed at the time of the conduct underlying the suit, the substantive law sought to be applied in the later proceedings governed the conduct when and where it occurred. In this way, viewing the immunity as an adjudicative jurisdiction doctrine gives it rule-of-law coherence.

To put the point conversely, imagine that foreign sovereign and official status-based immunities were viewed (incorrectly) as affecting prescriptive jurisdiction. The immunities would then block the jurisdiction of foreign states to regulate conduct underlying specific claims instead of merely blocking the jurisdiction of foreign states' courts to entertain those claims. Accordingly, any time a post-conduct trigger like a lapse in status or a waiver were to rescind immunity, any proceedings dependent on that post-conduct trigger would entail retroactive application of the law, since the law being applied did not, as a matter of prescriptive jurisdiction, govern the conduct when and where it occurred. And because both international and US law have long contemplated post-conduct rescissions of immunity,[7] the result would be a retroactive application of the law, defeating widely held and longstanding principles of legality.

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5 See Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 Am J Intl L 731, 738 (2012) (explaining that "the customary international law of state immunity has undergone profound change over the last hundred years, most significantly in the move from absolute to restrictive immunity"). See also Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* 1–9 (Oxford 2008).

6 See Section V.A.

7 *Republic of Austria v Altmann*, 541 US 677, 711 (2004), citing *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480, 486 (1983); Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 Am J Intl L 407, 425 (2004).

Last, the Article addresses official conduct-based immunity. It begins by canvassing the law and explaining that, unlike the relatively well-settled laws of foreign sovereign and status-based immunities, the law of conduct-based immunity is in flux. It then argues that if conduct-based immunity is deemed a substantive as opposed to a jurisdictional defense, it comes into more direct conflict with *jus cogens* norms of international law. As a result, prevailing arguments for preserving immunity in the face of claims of *jus cogens* violations lose force when it comes to conduct-based immunity. The reason is the immunity is a substantive defense from liability, not a jurisdictional defense about the appropriate forum. It thus comes into more direct conflict with, and accordingly must yield to, *jus cogens*. The Article finds that present international law would be most receptive to this type of argument in criminal as opposed to civil cases. And it concludes that the uncertain nature of the law of conduct-based immunity may signal movement in international law away from immunity and toward accountability. Accountability norms have been pressing on immunities for some time now. Foreign sovereign and official status-based immunities have so far successfully resisted that pressure; the fractured law of conduct-based immunity may not.

II. VARIOUS IMMUNITIES

Immunities come in various forms in both US and international law. One form immunizes from suit in domestic courts foreign sovereigns qua sovereigns.[8] This form of immunity is, unsurprisingly, called foreign sovereign immunity, though it is also referred to as foreign state immunity outside the United States. Thus foreign sovereign immunity immunizes Italy—the sovereign state—from suit in US courts. In the United States this form of immunity is presently governed by statute, the Foreign Sovereign Immunities Act of 1976 (FSIA).[9]

Another form of immunity immunizes from suit particular high-ranking officials of foreign states, such as heads of state and foreign ministers.[10] As might be expected, this form of immunity is generally called foreign official immunity or, where applicable, head-of-state immunity.[11] Thus foreign official or head-of-state immunity immunizes the Italian head of state from suit in US courts.

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8 Fox, *The Law of State Immunity* at 1 (cited in note 1).

9 Foreign Sovereign Immunities Act, Pub L No 94-583, 90 Stat 2891 (1976), codified as amended in various sections of 28 USC.

10 See *Samantar v Yousuf*, 130 S Ct 2278, 2291 (2010).

11 Id at 2290 n 15.

A further distinction exists between immunity that attaches because of a particular status, such as being head of state or foreign minister, and immunity that attaches because of the nature of the particular conduct underlying a claim, such as conduct performed as part of the actor's official duties. Readers might guess by now that these immunities are referred to, respectively, as status-based immunity and conduct-based immunity.[12] In international law speak, status-based immunity is called immunity *ratione personae*, and conduct-based immunity is called immunity *ratione materiae*.[13] Because the sources often use the Latin and English terms interchangeably, I will too by referring to status-based immunity or immunity *ratione personae* on the one hand, and conduct-based immunity or immunity *ratione materiae* on the other.

Status-based immunity or immunity *ratione personae* is basically an absolute protection for certain high-ranking officials like heads of state and ministers of foreign affairs against all proceedings in other states' courts.[14] That is, it blocks all foreign proceedings against these officials, irrespective of whether the proceedings relate to the officials' public or private acts or whether the acts occurred during or before the officials' tenure in office.[15] However, because the immunity attaches only to the officials' status as an office holder, once tenure in office ceases so too does the status-based immunity.[16]

At this point, the only immunity potentially available to former officials is conduct-based immunity, or immunity *ratione materiae*. This form of immunity is both broader and narrower than status-based immunity or immunity *ratione personae*. It is broader because it arguably extends to anyone acting on behalf of the state, not just high-level officials, and it also continues to protect former officials after they have left office; but it is narrower because, as its name suggests, it applies only in respect of official conduct.[17] A key question right now in both US and international law is whether this conduct-based immunity *ratione materiae* attaches in respect of conduct that constitutes serious violations of

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12 Chimène I. Keitner, *Foreign Official Immunity and the "Baseline" Problem*, 80 Fordham L Rev 605, 605 (2011).

13 Ingrid Wuerth, *Foreign Official Immunity Determinations in US Courts: The Case against the State Department*, 51 Va J Intl L 915, 929 (2011).

14 See Akande, 98 Am J Intl L at 410 (cited in note 7).

15 Id; *Yousuf v Samantar*, 699 F3d 763, 769 (4th Cir 2012). But see Wuerth, 106 Am J Intl L at 740–41 (cited in note 5) (explaining that "[h]istorically, *ratione personae* immunity has been close to absolute. Today, the issue is somewhat more complicated because some states view status immunity as a function of state immunity itself; accordingly, heads of state (like states themselves) are perhaps not entitled to immunity from civil proceedings for certain private acts.").

16 Akande, 98 Am J Intl L at 410 (cited in note 7).

17 Id at 412–13; Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 Yale J Intl L Online *1, *9 (2010).

international law and, more specifically, violations of what are called *jus cogens*, or peremptory norms of international law—including prohibitions on grave human rights abuses like torture and genocide.[18] I return to this question in the last section of the Article.

III. IMMUNITY AND JURISDICTION

Like immunity, the term "jurisdiction" encompasses a multitude of legal doctrines in both US and international law. A good way to begin exploring the relationship between jurisdiction and immunity is by sorting out some of these jurisdictional doctrines. And a good place to start doing that is with the initial observation that the international legal doctrine traditionally most at odds with the notion of immunities for foreign sovereigns and their officials is, in fact, a doctrine of jurisdiction. Specifically, classical international law granted all states absolute power within their own territorial jurisdictions. To borrow US Supreme Court Chief Justice John Marshall's famous formulation of the law in 1812:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . [19]

If a state's jurisdiction within its own territory is exclusive and absolute, then any rule restricting the exercise of that jurisdiction—such as a rule according immunity to foreign sovereigns or their agents—"would imply a diminution of [the forum state's] sovereignty" by undermining its exclusive and absolute territorial jurisdiction. In other words, foreign sovereign and official status immunities are in fundamental tension with a state's exclusive and absolute territorial jurisdiction, also commonly referred to as its "sovereignty," because the immunities purport to limit what a state may do within its own territory.

Of course, as the name suggests, the doctrine of foreign sovereign immunity also purports to anchor itself in sovereignty: namely, the sovereignty of other coequal states in the international system. An enduring rationale for the doctrine draws from the Latin maxim *par in parem non habet imperium*, or "one sovereign State is not subject to the jurisdiction of another State."[20] Hence the doctrine of foreign sovereign immunity simultaneously subverts and supports sovereignty. It subverts the sovereignty of the forum state that otherwise could

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18 See *Yousuf*, 699 F3d at 775–78; Wuerth, 106 Am J Intl L at 732 (cited in note 5); Curtis A. Bradley and Laurence R. Helfer, *International Law and the US Common Law of Foreign Official Immunity*, 2010 Sup Ct Rev 213, 237–38 (2010).

19 *The Schooner Exchange v McFaddon*, 11 US 116, 136 (1812).

20 Fox, *The Law of State Immunity* at 57 (cited in note 1).

exercise jurisdiction, and it supports the sovereignty of the foreign state that otherwise could be subject to that jurisdiction.

Others have explored different ways of conceptualizing the doctrine's source in international law—in particular, whether it is an exception voluntarily carved out of the forum state's otherwise exercisable jurisdiction, or instead consists of some grant of right to the foreign state against proceedings in the forum state—as well as the implications of those differing conceptualizations.[21] This quandary about the doctrine's root stretches back in one form or another at least to Marshall's opinion in the *Schooner Exchange v McFaddon* quoted above.[22] There, the Chief Justice took the exception view, explaining that "all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory"[23]—consent that could be either express or, more usually, implied, since in Marshall's lyrical prose, "all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands."[24]

It is not my objective to intervene in longstanding discussions about where the international law of foreign sovereign immunity and related doctrines of official status- and conduct-based immunity come from, or even really to critique current doctrine. Rather, I intend to take the settled law more or less as I find it. What I do want to do, however, is give that law doctrinal coherence for courts and lawyers increasingly confronting these immunity issues. My aim will be not only to explain how the law works but also how it can work going forward in areas that remain somewhat less settled. With this goal in mind, it will be helpful now to delve deeper into jurisdictional doctrine in order to discern precisely which types of jurisdiction these various immunities interact with.

IV. FOREIGN SOVEREIGN AND STATUS-BASED IMMUNITIES

As noted, foreign sovereign immunity and status-based immunity are often referred to as "jurisdictional immunities."[25] Thus the recent case in the International Court of Justice (ICJ) in which Germany claimed that Italy failed to

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21 See Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 Am J Intl L 741, 746–57 (2003); Fox, *The Law of State Immunity* at 74–77 (cited in note 1); Keitner, 80 Fordham L Rev at 606–08 (cited in note 12).

22 See note 19. See also *Verlinden B. V. v Central Bank of Nigeria*, 461 US 480, 487–88 (1983); Monroe Leigh, *Sovereign Immunity—The Case of the "Imias"* 68 Am J Intl L 280 (1974); Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 Vand J Transnatl L 1105, 1117 (2011).

23 *The Schooner Exchange*, 11 US at 143.

24 Id at 138.

25 See, for example, notes 26–27.

respect Germany's sovereign immunity under international law was officially styled the "Jurisdictional Immunities of the State" case.[26] Similarly, when the Democratic Republic of the Congo (the Congo) challenged Belgium's issuance of an arrest warrant against the Congolese Minister of Foreign Affairs in the ICJ on status-based immunity grounds, the ICJ repeatedly referred to the immunity at issue as "jurisdictional immunity."[27] But in what way are these immunities "jurisdictional"? To be sure, they purport to preclude one state from exercising jurisdiction over another state and its officials, but what *type* of jurisdiction are we talking about?

A state's "jurisdiction"[28] is not monolithic under international law. Rather, it comprises three main aspects, often referred to as jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.[29] Jurisdiction to prescribe, or prescriptive jurisdiction, is the power to make and apply law to persons or things.[30] Jurisdiction to adjudicate, or adjudicative jurisdiction, is the power to subject persons or things to adjudicative or judicial process.[31] And jurisdiction to enforce, or enforcement jurisdiction, is the power to enforce law as to persons or things.[32]

In this Section, I explain that when courts describe foreign sovereign immunity and status-based immunity as jurisdictional, these immunities are jurisdictional only in the sense that they block adjudicative or judicial jurisdiction.[33] That is, foreign sovereign and status-based immunities bar only the exercise of jurisdiction by foreign courts. Equally significant, and in tandem with describing foreign sovereign and status-based immunities as bars to adjudicative jurisdiction, courts also tend to emphasize that, "immunity does not mean

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26 *Jurisdictional Immunities of the State (Ger v Ita)*, 2012 ICJ 1 (Feb 3, 2012).

27 *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belg)*, 2002 ICJ 3, 24–25 at ¶¶ 59–60 (Feb 3, 2002).

28 The word "jurisdiction" is basically a legal term for power, literally the power to "speak law." The term derives from the Latin *jus* or *juris* (law) plus *dicere* (speak). William R. Trumbull and Angus Stevenson, eds, *Shorter Oxford Dictionary on Historical Principles* 1472 (Oxford 5th ed 2002). It literally means "the speaking of law." Costas Douzinas, *The Metaphysics of Jurisdiction*, in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* 21, 22 (Routledge-Cavendish 2007).

29 Restatement (Third) of the Foreign Relations Law of the United States § 401 (1987).

30 Id § 401(a).

31 Id § 401(b).

32 Id § 401(c) and introductory note.

33 See, for example, Fox, *The Law of State Immunity* at 1 (cited in note 1) ("Immunity is a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal court of one State from adjudicating the disputes of another State.").

impunity."[34] This frequently heard qualification is not some trite bromide repeated to make everyone feel better about immunizing from domestic justice systems what might look like very bad behavior by foreign actors. Rather, it is intended to convey that the immunity does not remove liability under the governing substantive law; it merely prevents certain judicial bodies from entertaining suit in certain circumstances.

I want to argue that this latter point—that foreign sovereign and status-based immunities do not remove liability under the governing substantive law—highlights another key relationship between these immunities and jurisdiction: namely, their relationship with prescriptive jurisdiction. In short, while these immunities may block the exercise of adjudicative jurisdiction by foreign courts, they do not block the reach and application of foreign *law* to the underlying conduct at issue if a foreign state has a basis of prescriptive jurisdiction to regulate the conduct under international law.

States currently enjoy a number of bases of prescriptive jurisdiction under international law, including over conduct inside other states. For instance, states may regulate not only acts that occur within their own territories, but also acts abroad that have, or are intended to have, effects within their territories—or what is called objective territoriality jurisdiction.[35] States may also regulate acts by their nationals abroad—or "active personality jurisdiction"—as well as acts against their nationals in some circumstances—or "passive personality jurisdiction."[36] In addition, states may regulate acts abroad that threaten "the security of the state or other offenses threatening the integrity of governmental functions," like espionage or counterfeiting the state's currency[37]—or what is often referred to as the protective principle of jurisdiction.[38] Finally, the principle of universal jurisdiction authorizes all states to apply substantive international law to certain especially harmful offenses, including piracy, slavery, genocide, torture, war crimes, crimes against humanity, and some acts of terrorism.[39] Indeed, to the extent states accurately implement and apply the international

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34 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 25, ¶ 60; United Nations, Press Release, *Legal Committee is Told Immunity of High Officials in Foreign Jurisdiction Must Not Mean Impunity for Commission of Grave Crimes: Concern over 'Balance' Needed to Preserve Stability in International Relations*, UN Doc GA/L/3426 (Nov 1, 2011), online at http://www.un.org/News/Press/docs/2011/gal3426.doc.htm (visited Feb 28, 2013). See also Sévrine Knuchel, *State Immunity and the Promise of* Jus Cogens, 9 Nw J Intl Hum Rts 149, 181–82 (2011).

35 Restatement (Third) of Foreign Relations Law of the United States § 402(1)(c) (1987).

36 Id § 402(2), comment g.

37 Id § 402(3), comment f.

38 Id.

39 See Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 Va J Intl L 149, 186–98 (2006) (appendix detailing current universal jurisdiction offenses under international law).

substantive law proscribing these offenses in domestic law and proceedings, states do not exercise extraterritorial jurisdiction by projecting solely domestic law abroad to defendants, but instead act as decentralized enforcers of a universally applicable international law prohibiting the conduct everywhere.[40]

To give the dynamic between doctrines of foreign sovereign and status-based immunities and doctrines of prescriptive jurisdiction more concrete illustration, suppose a high-ranking State B official engages in activity in State A that violates State A's laws. On the view presented so far, State A's laws regulate that activity and impose liability when and where the act occurs. Status-based immunity or immunity *ratione personae* may block the exercise of jurisdiction by State A's courts to apply that conduct-regulating rule through State A's domestic judicial proceedings, but liability under the law still exists in the abstract. The same is true if the conduct at issue violates international law. Liability under international law exists, but the status-based immunity may bar other states' courts from applying that law to the defendant. And if the conduct constitutes a universal jurisdiction offense, every state in the world has prescriptive jurisdiction to regulate that activity under international law.[41] Again, the status-based immunity blocks only the jurisdiction of foreign courts to adjudicate; but substantive liability under international law exists always and everywhere.

The cases bear this out. For example, in the Congo versus Belgium *Arrest Warrant* case, the Congo objected to Belgium's claim of universal jurisdiction over the Congolese Minister of Foreign Affairs on grounds of status-based immunity. The Congo stressed, however, that "immunity does not mean impunity."[42] Indeed the Congo accepted that immunity based on official status did not exempt violators of international law from liability.[43] Rather, immunity attached only to bar proceedings before certain courts and for a certain period of time.[44] What comes through in the Congo's position before the Court is that immunity is procedural in the sense that it is immunity *from proceedings* and, more

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40 Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 Mich J Intl L 881, 883 (2009) (arguing that "the prescriptive reach of universal jurisdiction is not really *extra*territorial at all; but rather comprises a comprehensive territorial jurisdiction, originating in a universally applicable international law that covers the globe").

41 There is a symbiosis in this respect between prescriptive and adjudicative jurisdiction when it comes to the exercise of universal jurisdiction. Because it is the definition of the offense under international law that gives rise to jurisdiction in the first place, states must employ that international legal definition when they exercise universal jurisdiction. In this respect, the applicable law—whether it is incorporated into a domestic rule of decision or just applied directly by courts—is substantive international law. See id at 901–16.

42 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 20, ¶ 48 (cited in note 27).

43 Id.

44 Id.

specifically, from judicial proceedings, not from a substantive, conduct-regulating rule. Thus, cast in the context of the *Arrest Warrant* case, the status-based immunity did not interdict Belgian *law* prohibiting universal jurisdiction offenses from regulating activity by foreigners abroad. It was just that Belgian *courts* could not subject the Congolese Minister of Foreign Affairs to judicial process or adjudicative jurisdiction.

The ICJ adopted this position in the case, explaining in now familiar terms that, "*immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts."[45] The Court elaborated: "While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility."[46] A number of separate opinions in the case also take this view.[47]

The same goes for foreign sovereign immunity. In the Germany versus Italy *Jurisdictional Immunities of the State* case, the ICJ considered there to be "no doubt" that the activities Italy alleged Germany had perpetrated during World War II constituted serious violations of the international law of armed conflict applicable in 1943–45.[48] Yet the Court went on to explain that it was "not called upon to decide whether these acts were illegal," which nobody disputed, but rather was called upon only to decide "whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity."[49] Hence, when the ICJ observed that "immunity

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45 Id at 25, ¶ 60.

46 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 25, ¶ 60 (cited in note 27).

47 See, for example, id at 60, ¶ 5 (Koroma, separate opinion):

> Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State . . . It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents an exemption from legal process.

Id at 85, ¶ 74 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("[I]mmunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.").

48 *Jurisdictional Immunities of the State*, 2012 ICJ at 22, ¶ 52 (cited in note 26).

49 Id at 23, ¶ 53. See also Fox, *The Law of State Immunity* at 33 (cited in note 1) ("The plea is one of immunity from suit, not of exemption from law.").

is essentially procedural in nature," and that "[i]t regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful,"[50] the Court again confirmed that immunity is procedural in the sense that it immunizes defendants from *proceedings*—specifically, from judicial proceedings. The substantive conduct-regulating rule of international law always proscribes the activity as illegal.

A final point in support of categorizing foreign sovereign immunity as jurisdictional is the manner in which the claim is typically raised in proceedings. It resembles an objection to what US lawyers might think of as personal jurisdiction. Although there is naturally variation across different nations' justice systems, the claim is generally raised early in proceedings as an objection to the power of the court to entertain suit and, more specifically, to entertain suit as to the particular defendant.[51] And like personal jurisdiction, the objection may be waived. (Though as will be discussed, where the defendant is a human being the authority to waive rests with the defendant's home state, as opposed to the defendant herself.[52]) In fact, the claim may be even stronger than a personal jurisdiction objection in US federal courts since it is immediately appealable. As Carlos Vazquez has noted with respect to the US Supreme Court's consideration of whether the FSIA confers jurisdictional or substantive immunity: "The Court need only have considered why the defendants were permitted to appeal against the district court's denial of their motion to dismiss on sovereign immunity grounds" to conclude that the immunity was jurisdictional.[53] Because the interlocutory appeal is designed to "protect[] the defendant not merely from substantive liability but also from the burdens of litigation . . . [t]he decision to allow the appeal was thus itself a reflection of the immunity's status as a present protection from the burdens of suit."[54] Accordingly, properly conceptualized, foreign sovereign and status-based immunities are jurisdictional only in the sense that they block the exercise of jurisdiction by courts; they do not block prescriptive jurisdiction to make and apply substantive law to defendants' conduct.

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50 *Jurisdictional Immunities of the State*, 2012 ICJ at 25, ¶ 58.

51 Fox, *The Law of State Immunity* at 29–30 (cited in note 1). See also Tomuschat, *The International Law of State Immunity and Its Development by National Institutions* at 1119–20 (cited in note 22).

52 See Section V.B.1.

53 Carlos M. Vázquez, Altmann v. Austria *and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 J Intl Crim Just 207, 213 (2005).

54 Id.

V. RETROACTIVITY AND LEGALITY

This section argues that viewing foreign sovereign immunity and official status immunity as doctrines affecting adjudicative, not prescriptive, jurisdiction reconciles these immunities with legality principles central to the rule of law.[55] In other words, it gives the doctrines what we might think of as rule-of-law coherence by helping them satisfy certain core criteria that "concern the form of the norms that are applied to our conduct"[56]—criteria that insist, for example, that law be general, public, prospective, intelligible, consistent, practicable, stable, and congruent.[57] Each of these rule-of-law criteria, to quote Lon Fuller, helps law achieve its "objective of giving a meaningful direction to human effort."[58] In short, the less law conforms to these rule-of-law criteria, not only is it less fair, but it is also less effective. Imagine a secret law (failing the criterion of publicity), or a law written in gibberish (failing the criterion of intelligibility), or a law commanding people to do the impossible—for example: "From now on everyone must levitate at all times" (failing the criterion of practicability). Each of these rule-of-law deficiencies undermines both the legitimacy and the efficacy of the law in question.

Viewing foreign sovereign and status-based immunities as adjudicative jurisdiction doctrines helps the doctrines conform to the rule of law by avoiding the opposite of prospective laws: retroactive laws. The longstanding principle of non-retroactivity of the law, also commonly referred to in the criminal context as legality, holds that for a legal prohibition to be applied to conduct the prohibition must have governed the conduct when and where it occurred.[59] Otherwise, application of the legal prohibition could be unfair because those engaging in the conduct may not have had adequate notice of the law regulating their conduct when and where they acted.[60] Legality also safeguards the legitimacy and efficacy of the law itself; if actors cannot predict how the law will

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55 See Anthony J. Colangelo, *Spatial Legality*, 107 Nw U L Rev 69, 71–72 (2012).

56 Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in James E. Fleming, ed, *Getting to the Rule of Law* 4 (New York 2011).

57 Id at 4–5.

58 Lon L. Fuller, *The Morality of Law* 66 (Yale 1964).

59 Colangelo, *Spatial Legality* at 71–73 (cited in note 55).

60 See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U Pa L Rev 335, 336 (2005) (noting that "[i]n its original Latin dress, the legality principle was expressed as '*nullum crimen sine lege, nulla poena sine lege*,' meaning roughly 'no crime without law, nor punishment without law'").

end up treating their behavior, the law loses legitimacy and effectiveness as a tool for shaping behavior.[61]

If all foreign sovereign and official status immunities do is affect the adjudicative jurisdiction of courts, two important consequences follow. First, the relevant conduct or event to which the immunities apply is not the conduct underlying or giving rise to suit, but rather the court's exercise of jurisdiction to entertain that suit. As a result, the applicable law-in-time to gauge immunity claims is the law in existence at the time a court decides whether to entertain suit, not the law in existence at the time of the conduct underlying the suit. This is an important consequence because, like all international law, the law of foreign sovereign and official status immunities is fluid; it can and has changed over time and it is likely to continue to change. Thus, claims that may not have succeeded in the past because they would have run into an immunity blockade may now move forward on the same underlying facts, and vice versa.[62]

The second important consequence is that situations in which these immunities previously would have blocked proceedings that later may go forward due to a post-conduct rescission of immunity—think a waiver of immunity or a lapse in official status—present no retroactivity or legality problems. As long as a basis of prescriptive jurisdiction existed at the time of the conduct underlying the suit, the substantive law sought to be applied in the later proceedings governed the conduct when and where it occurred. In this way, viewing the immunity as an adjudicative jurisdiction doctrine gives it rule-of-law coherence.

Perhaps this second point is more effectively made in the converse. Suppose foreign sovereign and official status immunities were incorrectly viewed as affecting prescriptive jurisdiction. They would then block the jurisdiction of foreign states to regulate the conduct underlying specific claims instead of merely blocking the jurisdiction of foreign states' courts to entertain those claims. Accordingly, any time a post-conduct trigger like a lapse in official status or a waiver were to rescind the immunity, any proceedings dependent on that post-conduct trigger would entail retroactive application of the law (since the law being applied did not, as a matter of prescriptive jurisdiction, govern the conduct when and where it occurred). And because international and US law have long

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61 John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 205 (1985) (stating that "[n]otice is essential to fairness. Crimes must be defined in advance so that individuals have fair warning of what is forbidden: lack of notice poses a 'trap for innocent' and 'violates the first essential of due process of law.'") (citation omitted). See *Landgraf v USI Film Prods*, 511 US 244, 266–67 (1994); *Kaiser Aluminum & Chem Corp v Bonjorno*, 494 US 827, 855–56 (1990) (Scalia concurring). See also *Dash v Van Kleeck*, 7 Johns 477, 485 (NY Sup Ct Feb 1811).

62 See Section V.A.

contemplated post-conduct rescissions of immunity,[63] the result would be an incoherent doctrine, at least in terms of the rule-of-law criterion of legality. I will elaborate each of these two consequences in turn.

A. Retroactivity and the Applicable Law in Time

In line with the adjudicative jurisdiction view of foreign sovereign and status-based immunities, both international and US courts consider the relevant conduct to which these immunities apply to be the exercise of jurisdiction by courts to entertain suit, not the conduct underlying or giving rise to that suit. As a result, if the law of immunity changes in a way that removes (or adds) immunity where it did not previously exist at the time of the underlying conduct, courts use the current law of immunity when deciding whether to exercise jurisdiction. Consequently, the actionability of claims arising out of the same underlying conduct changes right along with changes in the law of immunity.

For example, in the *Jurisdictional Immunities of the State* case the ICJ viewed immunity as a procedural doctrine that governs only the competence to adjudicate a dispute, not the lawfulness of the conduct underlying that dispute.[64] In turn, the ICJ applied the contemporary law of foreign sovereign immunity to proceedings concerning underlying conduct and events from 1943–45.[65] Again, to make the point conversely: if foreign sovereign immunity were instead a doctrine of prescriptive jurisdiction, it would have governed the lawfulness of the conduct itself. And if that were so, then the Court would have had to apply the law of immunity at the time the conduct occurred in 1943–45 or risk serious legality or retroactivity problems because applying the contemporary law of immunity in 2012 would have resulted in retroactive application of current rules to conduct in 1943–45. But because the relevant question was not the lawfulness of the underlying conduct but rather the jurisdiction of a foreign court to adjudicate disputes arising out of that conduct, the contemporary law of immunity could apply without amounting to retroactive application of the law.[66]

This approach also fits with the US Supreme Court's jurisprudence on the applicability of the FSIA to post-enactment claims predicated on pre-enactment conduct. The leading case in this area, *Republic of Austria v Altmann*,[67] could easily inspire a movie script and dramatically shows how intervening changes in the

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63 See Section V.B.

64 *Jurisdictional Immunities of the State*, 2012 ICJ at 25, ¶ 58 (cited in note 26).

65 While substantive rules generally are not applied retroactively, procedural rules generally can be. See *Landgraf v USI Film Prods*, 511 US 244, 275 (1994).

66 *Jurisdictional Immunities of the State*, 2012 ICJ at 38, ¶ 93 (cited in note 26).

67 541 US 677, 680 (2004).

law of foreign sovereign immunity may open up new avenues of relief. Maria Altmann, the sole surviving heir of Ferdinand Bloch-Bauer, a Jewish Viennese sugar magnate and patron of the arts, sued Austria and the Austrian National Gallery in US court to recover a number of paintings by the famous Austrian artist, Gustav Klimt.[68] The paintings, two of which were of Ferdinand's wife (with whom Klimt is alleged to have had an affair[69]), were Ferdinand's before the Nazi invasion and annex of Austria, or what became known as the "Anschluss."[70] Ferdinand fled Austria before the invasion, during which his sugar company was "Aryanized" and his home and possessions, including the paintings, taken by the Nazis.[71] Through a number of transactions including sales by one "Dr. Fuhrer"—the Nazi lawyer who initially took possession of the Klimts—the paintings ended up in the Austrian National Gallery.[72] After an investigative journalist uncovered evidence pointing to Altmann's rightful claim to the paintings decades later, and efforts to recover them through the Austrian justice system proved difficult, Altmann sued in the US District Court for the Central District of California to get the paintings back.[73]

Altmann argued that Austria and the Gallery were not entitled to foreign sovereign immunity under the FSIA because her claims fell within the Act's express "expropriation exception," which exempts from immunity cases involving "rights in property taken in violation of international law."[74] In response, Austria and the Gallery argued that in the late 1940s when most of the alleged wrongdoing took place, they would have enjoyed absolute immunity; accordingly, their argument went, to apply the 1976 FSIA to such pre-enactment conduct would constitute an impermissible retroactive application of the law.[75] It should be said that the Court's discussion of the retroactivity issue thus framed is not a model of clarity. But it does conform to the general notion that immunity is jurisdictional in the sense that it blocks the adjudicative jurisdiction of courts as opposed to prescriptive jurisdiction to regulate conduct.

The Court began by observing that statutes that "merely confer or oust jurisdiction" could be applied to past conduct because "[s]uch application . . . usually takes away no substantive right but simply changes the tribunal that is to

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68 Id.

69 See Frank Whitford, *Klimt* 12 (Thames & Hudson 1990).

70 *Altmann*, 541 US at 682.

71 Id.

72 Id.

73 Id at 684–85.

74 *Altmann*, 541 US at 685 (quoting 28 USC § 1605(a)(3)).

75 Id at 686. This argument was made as a matter of statutory construction. Congress could have applied the law retroactively with a clear statement, but did not.

hear the case."[76] In this connection, the Court explained that "the FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither increases those states' liability for past conduct nor imposes new duties with respect to transactions already completed."[77] This is consistent with viewing foreign sovereign immunity as a doctrine of adjudicative jurisdiction. Because the relevant conduct at issue is the court's exercise of jurisdiction to entertain the claim, not the conduct underlying the claim, there is no retroactivity problem.

Nonetheless, the Court found its observation about the FSIA's jurisdictional nature to be in "tension" with prior precedent describing the FSIA as a codification of "the standards governing foreign sovereign immunity as an aspect of *substantive* federal law."[78] As a result, the Court was unable to cleanly categorize the statute as either purely procedural or purely substantive. This left the Court searching for anything else in the statute or its enactment history that would suggest whether, and how, it should apply.

Here the Court latched onto the preamble, which provides "*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."[79] The Court found this language "unambiguous: Immunity 'claims'—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act; those claims are 'henceforth' to be decided by the courts."[80] In other words, the relevant conduct addressed by the statute is the court entertaining the claim, not the conduct underlying the claim. The Court's analysis thus wound its way around the precedent calling the Act substantive and, in this roundabout way, concluded that foreign sovereign immunity is a doctrine of adjudicative jurisdiction.[81]

Altmann's holding has also been used to opposite effect; that is, it has been used to confer immunity where immunity otherwise would not have existed when the conduct underlying the suit occurred. In *Abrams v Societe Nationale Des Chemins De Fer Francais*, the US Court of Appeals for the Second Circuit (on

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76 Id at 693 (internal citations and quotations omitted).

77 Id at 695 (internal citations and quotations omitted).

78 *Altmann*, 541 US at 695 (internal citations and quotations omitted).

79 Id at 697 (quoting 28 USC § 1602).

80 Id.

81 Justice Scalia was much more straightforward in his concurrence, explaining that "the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power rather than to regulate primary conduct, so that the relevant time for purposes of retroactivity analysis is not when the underlying conduct occurred, but when judicial power was invoked." Id at 703 (internal quotations and citations omitted).

remand to reconsider in light of *Altmann*),[82] used the present status of the French national railroad company to immunize it against claims for war crimes and crimes against humanity arising out of the transportation of tens of thousands of civilians to Nazi death and labor camps.[83] Although at the time of the alleged wrongdoing the railroad was under entirely civilian control, and therefore would not have enjoyed immunity in US courts, it had since been wholly acquired by the French government.[84] Relying on *Altmann*, the Second Circuit held that the present status of the railroad was the relevant status to determine immunity, and, "[a]ccordingly, the evil actions of the French national railroad's former private masters . . . are not susceptible to legal redress in federal court today, because defendant has since become a part of the French government and is therefore immunized from suit by the Foreign Sovereign Immunities Act."[85]

B. Legality and Rule-of-Law Coherence

The second important consequence of viewing foreign sovereign and status-based immunities as relating to adjudicative jurisdiction is avoidance of retroactive applications of the law. Both international and US law permit post-conduct triggers to rescind both types of immunity. Again, to put the point conversely: if foreign sovereign and status-based immunities were instead viewed as prescriptive jurisdiction doctrines, any proceedings based on post-conduct rescissions of immunity would create legality or retroactivity problems because the substantive conduct-regulating rule sought to be applied in the proceedings did not govern the underlying conduct when and where it occurred. But because foreign sovereign and status-based immunities block only the adjudicative jurisdiction of courts, no legality problems arise since prescriptive jurisdiction to regulate the underlying conduct existed when the conduct occurred. A few status-based immunity examples illustrate the point.

1. Waiver.

First, according to both the ICJ and US courts, a defendant's home state can waive the defendant's status-based immunity before a foreign state's courts.[86] But if that foreign state could not have prosecuted or entertained suit

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82 389 F3d 61, 63 (2d Cir 2004).

83 Id at 62.

84 Id.

85 Id at 64–65.

86 See Fox, *The Law of State Immunity* at 30–32, 105 (cited in note 1). See also *Mamani v Berzain*, 654 F3d 1148, 1151 n 4 (11th Cir 2011) (stating that "[w]e accept that the present government of Bolivia has waived any immunity that defendants might otherwise enjoy"); *United States v Noriega*,

before the waiver because it didn't have prescriptive jurisdiction to regulate the conduct when it took place, there is an ex post facto problem. In other words, it cannot be that the only reason the conduct in question can now be subject to the foreign state's substantive conduct-regulating rule is an ex post trigger, like a waiver of immunity. The waiver would effectively spring to life a previously inapplicable conduct-regulating rule, which then would have to reach back in time to regulate the conduct at issue. Such an application of the law would be blatantly retroactive.

Rather, the better way of understanding the interaction between jurisdiction and status-based immunity is that the foreign state always had prescriptive jurisdiction to regulate the conduct when and where it occurred. The status-based immunity simply blocked foreign states' courts from entertaining suit against the defendant. But once immunity is waived, that waiver removes the adjudicative-jurisdiction impediment to foreign court proceedings. The foreign state may then enforce via judicial process the conduct-regulating rule that had already governed the conduct when and where it occurred.

2. Change in status.

Similarly, the ICJ has explained that after a person ceases to hold an office to which immunity attaches, that person will no longer enjoy all the status-based immunities accorded by international law in foreign states.[87] Again, the only way an ex post event, such as a change in status—say, from Head of State to not-Head of State, or Minister of Foreign affairs to not-Minister of Foreign Affairs—occurring *after* conduct takes place can justify the application of a substantive rule to the conduct is if the rule already applied at the time of conduct, but just couldn't have been enforced through judicial proceedings because of the status. On the other hand, if the substantive rule did not apply at the time of the conduct, there is once again a legality or retroactivity problem: application of the substantive conduct-regulating rule is predicated on some ex post trigger, namely the change in official status.

3. Other forums.

Finally, the ICJ has also observed that status-based immunity does not shield current office holders in proceedings before their home country courts and international criminal courts with appropriate jurisdiction.[88] The availability of these other forums suggests that where foreign states seek to apply

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117 F3d 1206, 1212 (11th Cir 1997) (citing *In re Doe*, 860 F2d 40, 44–46 (2d Cir 1988)); *In re Grand Jury Proceedings, Doe No 700*, 817 F2d 1108, 1110–11 (4th Cir 1987).

87 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 25, ¶ 61 (cited in note 27).

88 Dapo Akande and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 Eur J Intl L 815, 838–39 (2010).

international substantive norms applicable everywhere, the conduct-regulating rule of international law regulates the conduct when and where it occurs; other states just cannot enforce that same substantive rule in their own domestic courts. But the defendant's home state, and international tribunals, may.

This last point has taken center stage in domestic cases alleging violations of *jus cogens* norms of international law against both other states and their officials. And it has done so mainly by supplying a doctrinal device for reconciling foreign sovereign and status-based immunities with *jus cogens* in a way that preserves immunity in the face of allegations of serious violations of international law. The Latin term *jus cogens*, or compelling law, "refers to [international law] norms that command peremptory authority, superseding conflicting treaties and custom."[89] While the list may vary depending on the source one consults, these norms are generally considered to include prohibitions on serious human rights abuses like genocide, slavery, torture, and systemic racial discrimination.[90] If the peremptory power of *jus cogens* trumps contrary rules of international law, a question instantly arises whether *jus cogens* therefore also trump immunity for perpetrators of *jus cogens* violations.[91] At least since Nuremburg, international law has imposed individual liability on perpetrators of certain serious violations of international substantive law,[92] and immunity from proceedings designed to actually bring that liability to bear appears in tension with such an imposition of liability.[93]

Yet by viewing foreign sovereign and official status immunities as immunities from adjudicative jurisdiction, courts have been able to disaggregate the substantive prohibition of *jus cogens* on the one hand and its enforcement via certain types of judicial proceedings on the other, and thereby elide direct conflict between the two sets of norms. The rationale is basically as follows: because these immunities are not substantive bars to liability, they don't directly collide with the *jus cogens* nature of the substantive proscription of the conduct under international law. Hence, even accepting a "normative hierarchy" in international law in which *jus cogens* trump all contrary norms,[94] there is no direct

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89 Evan J. Criddle and Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 Yale J Intl L 331, 331 (2009).

90 Id.

91 See, for example, *Jurisdictional Immunities of the State*, 2012 ICJ at 37–39, ¶¶ 92–97 (cited in note 26). This is also often referred to as the "normative hierarchy theory." Akande and Shah, 21 Eur J Intl L at 832 (cited in note 88); Caplan, 97 Am J Intl L at 766–67 (cited in note 21).

92 See *In re Goering and Others*, 13 ILR 203, 221 (Intl Mil Trib 1946). See also Fox, *The Law of State Immunity* at 675–76 (cited in note 1).

93 See *Arrest Warrant of 11 April 2000*, 2002 ICJ at 11–19, ¶¶ 23–44 (cited in note 27).

94 See Caplan, 97 Am J Intl L at 766–67 (cited in note 21).

clash between *jus cogens* and immunity, since the conduct may still be unlawful as demanded by *jus cogens*, whereas immunity merely regulates or allocates the exercise of jurisdiction by states' domestic courts to enforce that substantive prohibition against other states and their officials. As the ICJ put it in the *Jurisdictional Immunities of the State* case:

> The two sets of rules [foreign sovereign or state immunity and *jus cogens*] address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[95]

Similarly, as to official status immunity, the *Arrest Warrant* judgment explained:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[96]

Accordingly, as with foreign sovereign or state immunity, substantive liability exists under international law and status-based immunity just blocks its enforcement by other states' courts.

VI. CONDUCT-BASED IMMUNITY AND *JUS COGENS*

Until now I have largely left aside the doctrine introduced earlier of conduct-based immunity or immunity *ratione materiae*, which immunizes in one state's courts official conduct performed by those acting on behalf of other states.[97] Unlike the fairly well settled law of foreign sovereign and status-based immunities, the law of conduct-based immunity is in flux. This section aims principally to assess the law of conduct-based immunity and, more specifically, legal arguments for and against using conduct-based immunity to block foreign courts from entertaining claims of *jus cogens* violations.

The discussion proceeds in two main stages. I first suggest that a promising and, if not under-argued at least under-scrutinized, avenue of argument for the *jus cogens* nature of an alleged international law violation to override conduct-based immunity is to cast the immunity as a substantive, as opposed to a procedural or jurisdictional, defense. Promising does not, however, always mean persuasive. Thus, second, I explore situations in which casting conduct-based

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95 *Jurisdictional Immunities of the State*, 2012 ICJ at 38, ¶ 93 (cited in note 26).

96 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 25, ¶ 60 (cited in note 27).

97 See Wuerth, 51 Va J Intl L at 929 (cited in note 13).

immunity as substantive is most persuasive on the current state of the law. As will be seen, the law of conduct-based immunity does not always fully cohere across different types of suits.

One may think it an unfortunate feature of law, and of international law in particular, that it does not always cohere. Yet the fractures that lead to incoherence are often what make room for change. In this vein, I suggest that the present incoherence of the law of conduct-based immunity may signal developments to come: namely, that in some respects immunity is eroding in the face of allegations of serious human rights abuses. Accountability for human rights violations has been pressing on immunity norms for some time. And while the settled law of foreign sovereign and status-based immunities has successfully resisted that pressure, the less-settled law of conduct-based immunity may not.

Here I would also like to try to be as normatively and methodologically transparent as possible. As it stands, the immunity doctrines that have crystallized thus far do not make much room for accountability absent a state either proceeding against its own agents for conduct performed on its behalf or consenting to other states doing so, unless it is in the empirically exceptional circumstance that an international tribunal with jurisdiction takes the case. Some readers may think it is never appropriate for one state to hold another state's agents accountable under international law absent the latter state's consent. I would not legally foreclose that possibility. Yet in what circumstances such proceedings ought to be allowed should, in my view, be up to states. This Section's objectives are to canvass the law and legal argument relating to conduct-based immunity and *jus cogens*, and to assess arguments for making, or keeping, the possibility of "horizontal" enforcement among states available.[98]

I should also be clear that because, in my view, there is currently not enough state practice accompanied by the requisite *opinio juris* to support a classification of conduct-based immunity as either substantive or jurisdictional,[99] the arguments below that conduct-based immunity can be viewed as substantive do not purport to describe current international law. Rather, I seek only to identify an area of legal uncertainty and to outline arguments from which litigants and other international legal actors may build. To the extent they are successful, that success may furnish hard data that can substantiate classifying conduct-based immunity and resolve present uncertainty as to its nature.

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98 Chimène I. Keitner, Germany v. Italy *and the Limits of Horizontal Enforcement: Some Reflections from a United States Perspective*, 11 J ICJ 167 (2013)

99 To constitute evidence of customary international law there must be both state practice and *opinio juris* addressing the issue. Compare Wuerth, 106 Am J Intl L at 742–65 (cited in note 5) (carefully analyzing state practice and *opinio juris* with respect to a human rights exception to immunity).

A. Conduct-Based Immunity as a Substantive Defense

Casting conduct-based immunity as an affirmative substantive defense offers a way for *jus cogens* to conflict with, and override, the immunity. Because a substantive defense of immunity does not block the jurisdiction of foreign courts to entertain suit, but instead blocks application of the otherwise applicable law to the defendant's conduct, viewing conduct-based immunity as substantive undermines prevailing arguments that preserve jurisdictional immunity in the face of allegations of serious violations of international law. More specifically, suits involving accountability for violations of *jus cogens* pose more direct conflicts of norms between *jus cogens* and immunity and, in turn, can create opportunities for *jus cogens* to trump immunity. Whether one views the *jus cogens* trump as an exception to immunity as the US Court of Appeals for the Fourth Circuit recently did in *Yousuf v Samantar*,[100] or as simply precluding the attachment of immunity to begin with,[101] whether and when conduct-based immunity yields to *jus cogens* have become major legal questions in both academic literature and courts around the world.[102]

Classifying conduct-based immunity as a substantive defense is important procedurally as well, since it does not affect the jurisdiction of courts as such and would need to be affirmatively raised, pleaded and proved by defendants, at least in US courts.[103] The result would be an initial judicial evaluation of the allegations to determine whether claims have adequate factual and legal support. As will be seen, US courts already largely perform this type of evaluation under current pleading standards[104] and such an evaluation also matches up with the US Department of State's approach to determining whether to request immunity before US courts for former foreign officials accused of serious violations of international law.[105]

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100 699 F3d 763, 777–78 (4th Cir 2012).

101 See William Dodge, *Making Sense of the Fourth Circuit's Decision in* Samantar (Opinio Juris Nov 3, 2012), online at http://opiniojuris.org/2012/11/03/making-sense-of-the-fourth-circuits-decision-in-samantar/ (visited Mar 1, 2013).

102 See note 18; see also Ulf Linderfalk, *The Effect of* Jus Cogens *Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 Eur J Intl L 853, 868 (2007).

103 See notes 114–15 and accompanying text.

104 See notes 116–18 and accompanying text.

105 See note 119 and accompanying text.

B. Implications of Conduct-Based Immunity as a Substantive Defense

A number of theories have been advanced for the proposition that immunity does not or should not apply to serious violations of international law including, in particular, violations of *jus cogens*. These theories have been critiqued by scholars and largely dismissed by courts,[106] mostly on the grounds discussed above that *jus cogens* and immunity address different issues—substantive liability on the one hand and jurisdiction to entertain suit on the other—and therefore don't come into direct conflict. But if, unlike foreign sovereign and status-based immunities, conduct-based immunity is deemed a substantive defense, the critiques lose force and give way to the possibility of liability for serious violations of international law colliding with, and overcoming, immunity.

1. The normative hierarchy view.

One argument that immunity should not attach, or is overcome, for serious violations of international law is the so-called "normative hierarchy" theory mentioned in the previous Section, which holds that *jus cogens* trump contrary norms of international law.[107] As we saw, courts have been able to avoid the normative hierarchy argument by basically avoiding direct conflict between *jus cogens* and immunity: that is, by disaggregating the substantive prohibition of *jus cogens* from the amenability to suit in another state's courts, *jus cogens* and immunity do not directly conflict.[108] But if conduct-based immunity is substantive rather than jurisdictional, the foreign court's power to entertain suit is not called into question. The question, instead, is whether conduct-based immunity shields the defendant from the operation of the otherwise applicable substantive law, including the international law imposing liability for serious human rights abuses. In this respect, conduct-based immunity does come into conflict with *jus cogens* and, accordingly, must yield.

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106 See notes 95–96. See also *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction By Roman Anatolevich Kolodkin, Special Rapporteur*, UN Intl L Commn, 62d Sess at 38–39 ¶ 64, UN Doc A/CN.4/631 (Jun 10, 2010). But see *Yousuf*, 699 F3d at 778.

107 Caplan, 97 Am J Intl L at 766–67, 776 (cited in note 21) (stating that "immunity in the forum state does not amount to global impunity for state conduct that violates human rights...the forum state may pursue a human rights claim in numerous alternative political and judicial arenas"). See *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 718 (9th Cir 1992) (stating in dicta that "[a] state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law").

108 See notes 95–96.

2. The implied waiver view.

Another theory argues that because *jus cogens* violations cannot qualify as official sovereign acts or conduct under international law, as soon as states engage in such violations they implicitly waive any immunity under international law as to that conduct.[109] And, because states can act only through human agents, immunity is also waived as to those agents. There are strong glimmerings of this theory in the Fourth Circuit's decision in *Yousuf v Samantar*.[110] There, the court refused to accord the defendant conduct-based immunity for serious human rights abuses and explained that it was following a trend in in which US courts have "conclud[ed] that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity."[111]

Yet the waiver view has also come under attack, on a couple of grounds. First, to the extent it purports to say that the *jus cogens* proscription or criminal nature of the conduct under international law strips that conduct of its sovereign or official-function status, the view ignores reality and international laws of criminal and state responsibility—which impose liability precisely because the conduct is considered official state action.[112] While this critique makes sense, if accepted it merely restates the basic question whether states and their agents can be held liable in other states' courts for official conduct that contravenes international law.

The second and probably more apposite critique for the present analysis is that by conditioning the existence of immunity on the merits of the underlying claim, the waiver theory effectively deprives defendants of jurisdictional immunity by predicating their immunity from suit on an inquiry into the merits of whether the alleged conduct violated *jus cogens*.[113] But if conduct-based immunity is deemed substantive and not jurisdictional, this argument also loses force. The reasoning would be as follows: if immunity is purely jurisdictional, all a court needs to conclude at the outset of suit is that immunity strips it of power over the defendant and the case is dismissed. But if immunity is deemed an affirmative substantive defense, the factual allegations in the complaint get squarely before the court, at least in the United States.[114] The defendant then bears the burden to raise and plead the affirmative defense in response,[115] and in

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109 See Akande and Shah, 21 Eur J Intl L at 815, 827–30 (cited in note 88).

110 699 F3d at 777.

111 Id at 776.

112 Akande and Shah, 21 Eur J Intl L at 830–32 (cited in note 88).

113 Id.

114 *Gomez v Toledo*, 446 US 635, 640–41 (1980).

115 Id.

turn there is procedural room for an initial evaluation of the legal and factual merits of the claim. It is at this stage that courts may determine whether the claims are well substantiated enough to legally and factually make out a *jus cogens* violation that defeats conduct-based immunity.

In fact, US courts already engage in just this type of analysis under current pleading standards, which instruct courts to evaluate allegations for "plausible grounds" that a violation occurred.[116] This is a fact-intensive exercise that requires courts to first identify "legal conclusions" and strip them from the complaint, and to then evaluate whether the remaining factual allegations plausibly state a claim.[117] Under this plausibility test, "the well-pleaded facts [must] permit the court to infer more than the mere possibility of misconduct."[118] This evaluation also happens to correspond with the US State Department's indications of when it will request conduct-based immunity on behalf of foreign defendants in US courts—namely, when "the complaint contains largely unspecific and conclusory allegations."[119] In sum, treating conduct-based immunity as an affirmative substantive defense carves out room under existing procedural mechanisms for courts to initially evaluate whether claims of *jus cogens* violations are plausibly supported in fact and law without damaging the notion of jurisdictional immunity. And these procedural mechanisms furnish an inquiry that matches up nicely with the US State Department's standard for deciding whether to request conduct-based immunity.

A final point in support of this type of initial judicial evaluation is that even jurisdictional immunities do not absolutely bar all judicial inquiry into the substance of claims. For example, courts have long distinguished at the outset of suits between acts *jure imperii*, or public acts of the state that entitle it to immunity, and acts *jure gestionis*, or private commercial acts of the state that do not.[120] If any judicial inquiry into the nature of claims necessarily defeated immunity, this longstanding and widely accepted distinction could not have developed and would need to be abandoned. Thus not only do courts already

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116 *Bell Atl Corp v Twombly*, 550 US 544, 556–57 (2007).

117 *Ashcroft v Iqbal*, 556 US 662, 678–79 (2009).

118 Id at 679.

119 Letter of Harold Hongju Koh, Legal Advisor to US Dept of State, to The Honorable Stuart F. Delery, Principal Deputy Assistant Atty Gen, Civil Div, Dept of Just, Dec 17, 2012, Re: *Scherr v Lashkar-e-Taiba et al.*, No 10-05381-DLI (EDNY); *Chroman v Lashkar-e-Taiba et al.*, No. 10-05448-DLI (EDNY); *Ragsdale v Lashkar-e-Taiba et al.*, No. 11-03893-DLI (EDNY); Statement of Interest and Suggestion of Immunity, *Rosenberg et al, v Lashkar-e-Taiba et al*, Civ Nos 10-10-05381-DLI, 10-05382 DLI, 10-05448-DLI, 11-03893 DLI, *10 (filed Dec 17, 2012).

120 See *Jurisdictional Immunities of the State*, 2012 ICJ at 25, ¶ 60 (cited in note 26); Wuerth, 106 Am J Intl L at 738 (cited in note 5).

perform some initial factual and legal inquiry to resolve immunity claims—even when claims are jurisdictional—treating conduct-based immunity as a substantive defense would open up more procedural space for courts to inquire into the legal and factual bases of claims alleging violations of *jus cogens* for which individual liability exists under international law.

3. The implied override view.

Another view sees the postwar development of principles authorizing extraterritorial jurisdiction by states over serious violations of international law committed by nationals of other states in an official capacity as erasing conduct-based immunity as to those violations.[121] In other words, the jurisdictional principles imply an override of immunity for the offenses for which they created jurisdiction; accordingly, I call this the implied override view. This was more or less the rationale employed by some of the Law Lords in the famous *Pinochet* case:[122] because the UN Convention Against Torture provides for the exercise of extraterritorial jurisdiction by all states parties over conduct—torture—that by definition must be committed in an official capacity, the jurisdictional provisions implicitly overrode any prior rule of immunity that would have rendered those provisions basically meaningless.[123] Thus, the argument goes, "where extra-territorial jurisdiction exists in respect of an international crime and the rule providing for jurisdiction expressly contemplates prosecution of crimes committed in an official capacity, immunity *ratione materiae* cannot logically co-exist with such a conferment of jurisdiction."[124]

One difficulty with this argument is that the principles of extraterritorial jurisdiction on which it rests do not distinguish between immunity *ratione personae* and immunity *ratione materiae* or, indeed, even mention immunity at all. Thus the entire argument must be implied, and the implication becomes somewhat tortured (no pun intended) since the jurisdictional principles must be construed to implicitly distinguish between different types of immunity, at least on the current state of the law. For as noted, it is presently clear that immunity *ratione personae* continues to exist so as to negate the operation of the jurisdictional

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121 See Akande and Shah, 21 Eur J Intl L at 839–46 (cited in note 88).

122 See *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)*, [2000] 1 AC 147, 289 (HL1999) (UK) (opinion of Lord Phillips of Worth Matravers) (stating that "[t]he exercise of extraterritorial jurisdiction overrides the principle that one state will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail. . . . Once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.").

123 Id.

124 Akande and Shah, 21 Eur J Intl L at 843 (cited in note 88).

principles as to current office holders.[125] In turn, one effectively must draw two implications: first, one must imply an override of immunity; and next, one must further imply a limit to that override for immunity *ratione personae*. This sort of heaping implication upon implication strains the international lawyer's fidelity to discerning international law from actual state practice and *opinio juris*.

Now, one may counter at this point that conduct-based immunity *ratione materiae* is distinguishable from status-based immunity *ratione personae* because the very nature of immunity *ratione materiae* necessarily precludes the exercise of jurisdiction contemplated by the extraterritorial jurisdiction principles, whereas immunity *ratione personae* reserves at least some role for the jurisdictional principles once the defendant leaves office. That is, unlike immunity *ratione materiae* immunity *ratione personae* does not completely gut the jurisdictional principles since they potentially have some bite once the protected status ends (that is, the accused leaves office). Of course, the jurisdictional provisions also contemplate extradition, so they may not be completely gutted anyway,[126] and realistically speaking, immunity *ratione personae* too may create immunity forever since potential defendants may grant themselves life tenure in office. But on a conceptual and doctrinal level, I believe this line of reasoning keys into why immunity *ratione materiae* can be treated differently than immunity *ratione personae*: namely, immunity *ratione materiae* can resemble a substantive defense to the application of all other states' laws imposing liability for serious violations of international law.

C. Application

As noted at the beginning of this Section, unlike the law of foreign sovereign and status-based immunities, the nature and scope of conduct-based immunity or immunity *ratione materiae* remains vague under international law. While there are some data points, it is probably safe to say that contemporary state practice and *opinio juris* have not combined to definitively determine its scope and, for present purposes, whether it is jurisdictional or substantive in nature. For their part, scholars tend to categorize it as a substantive defense. For instance, Antonio Cassese described conduct-based immunity *ratione materiae* as "relat[ing] to substantive law," and as a "substantive defence" available to "any *de jure* or *de facto* state agent," when the "violation is not legally imputable to [the agent] but to his state."[127] The late great international lawyer was not alone.[128]

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125 See notes 14–15.

126 I am indebted to my colleague, Jenia Turner, for pointing this out.

127 Antonio Cassese, *International Criminal Law* 303–04 (Oxford 2d ed 2008).

According to Rosanne van Alebeek, "functional immunity constitutes an exemption from the law in a personal capacity. The term 'immunity' may in fact not be the most apposite to describe the phenomenon at hand" since the doctrine instead constitutes a substantive defense.[129]

Nonetheless there are reasons to categorize conduct-based immunity as jurisdictional. One is simple analogy: like foreign sovereign and status-based immunities, conduct-based immunity functions to shield the state. Because foreign sovereign and status-based immunities are treated as jurisdictional shields, conduct-based immunity also should be treated as a jurisdictional shield. To put a finer point on the analogy: foreign sovereign immunity protects the state by shielding it from suits in other states' courts; similarly, status-based immunity shields the state by shielding certain officials currently acting as the state's key representatives in international relations from suit in other states' courts. By analogical extension, conduct-based immunity thus also should protect the state by shielding its agents and former officials from suit in other states' courts. And, here one can make the analogy even more specific: like status-based immunity, conduct-based immunity acknowledges that "the state" is really just an anthropomorphic construct and must, in reality, act through human agents. Therefore, like status-based immunity, conduct-based immunity also should protect those agents from suit in other states' courts—whether they are high-level officials or not, and whether they are current office holders or not.

Yet importantly, this argument is by analogy. That is, it argues that because conduct-based immunity is *like* status-based immunity—since it too seeks to protect the state by protecting the state's agents—conduct-based immunity ought therefore to be treated *like* status-based immunity in terms of the nature and scope of the protection it affords. But this does not necessarily need to be the case. International law is not analogically generated like, say, the common law.[130] Rather, it is a matter of empirical fact that "results from a general and

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128 Akande, 98 Am J Intl L at 413 (cited in note 7) (stating that "this type of immunity [ratione materiae] constitutes a substantive defense in that it indicates that the individual official is not to be held legally responsible for acts that, in effect, are those of the state") (citation omitted); Anna Hood and Monique Cormier, *Prosecuting International Crimes in Australia: the Case of the Sri Lankan President*, 13 Melbourne J Intl Law 235, 255 (2012) ("This type of immunity provides a *substantive* defence to any criminal charges, in the sense that immunity *ratione materiae* prevents legal responsibility from attaching to the individual, and instead shifts it to the state itself.") (citation omitted).

129 Van Alebeek, *The Immunity of States and Their Officials* at 133 (cited in note 5) (emphasis omitted).

130 See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 Harv Intl L J 271, 274 (2009) (explaining that "arguments by analogy are, however, misconceived to the extent they seek to identify existing customary international law")(emphasis omitted). Compare *Samantar v Yousuf*, 130 S Ct 2278, 2289 ("Reading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in § 1603(a) to include an official acting on behalf of the

consistent practice of states followed by them from a sense of legal obligation."[131] Accordingly, "[t]hat nations accept a principle . . . in one factual setting does not show that they accept similar principles in distinct factual settings where the balance of practical and normative considerations may be different."[132] And, when it comes to conduct-based as opposed to status-based immunity, the balance of practical and normative considerations may well be different.

For sure, at bottom both immunities protect the smooth functioning of international relations. Status-based immunity does so in an immediate and concrete way by preventing one state from entertaining suit against another state's current high-ranking officials formally representing the state in its international dealings. Conduct-based immunity also serves this international relations purpose[133] by providing a species of derivative protection for foreign states.[134] That is, it seeks to prevent derivatively entertaining suit against foreign states by 'piercing the veil,' so to speak, of their sovereign immunity in order to go after human beings or non-state entities acting on behalf of that state. Yet conduct-based immunity's derivative protection can be viewed as weaker than status-based immunity for a number of reasons.

First, the status of the agent protected by conduct-based immunity is neither synonymous with the state nor integral to conducting international relations. If the agent were equivalent to the state or so integral to international relations, he, she, or it would be subsumed under status-based immunity. And there would, in turn, be no need for different types of immunity. But international law distinguishes some state agents from others with different types of immunity; and, those most important to the smooth functioning of international relations, like heads of state and foreign ministers, enjoy status-based immunity while in office.

Which leads to a second distinction: the time period of conduct-based immunity may engender different factual and normative considerations about the scope of the immunity. Status-based immunity protects high-ranking officials only while they are in office. The reason for this time period is obvious: if a state cannot interact with other states through its formal representatives for fear that

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foreign state, and much to indicate that this meaning was not what Congress enacted.") (footnote omitted).

131 Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

132 Ramsey, 50 Harv J Intl L at 274 (cited in note 130).

133 See Curtis A. Bradley and Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137, 141–45 (2010).

134 See Harold Hongju Koh, *Foreign Official Immunity after* Samantar*: A United States Government Perspective*, 44 Vand J Transnatl L 1141, 1148 (2011).

those representatives will find themselves subject to suit in some foreign court in the course of their official duties, the state cannot act, and international relations suffers. Once the officials have left office, however, the threat to international relations is less direct, and status-based immunity ceases. Of course, one could argue that the *possibility* of being subject to suit at some future point could chill or deter current officials from performing official duties while in office, and that may be so. But the point remains that while in office, officials integral to international relations are totally immune and can perform their functions without interference. After they have left office, they must rely on a different immunity.

So far, I think we can say conduct-based immunity is distinguishable from status-based immunity. But is it weaker? Here international law in the form of state practice and *opinio juris* can be helpful. To begin with, it can't be that conduct-based immunity *always* protects state agents and former officials from suit in other states' courts. For that would "contradict[ ] the established State practice which holds functional immunity of military officers and other State officials, whether serving or retired, to be lost in respect of the commission of international crimes."[135] At least since Nuremberg, international law has held that conduct-based immunity does not protect state agents and former officials from suit for serious offenses against international law.[136] And it won't do to try to distinguish Nuremberg as an international court, since the tribunal itself was unambiguous that the states that "created this Tribunal ... have done together what any one of them might have done singly."[137] Thus the challenge is to figure out when—under what circumstances—conduct-based immunity yields to permit suits for serious violations of international law.

1. Criminal cases.

Nuremberg, along with Spain's well-known initiation of proceedings against former Chilean head of state Augusto Pinochet and the decision of the British Law Lords that Pinochet was not immune from suit for torture,[138] supply data points in favor of deeming conduct-based immunity either as inapplicable, or to yield, to norms of liability for serious human rights abuses in criminal cases. As Curtis Bradley and Laurence Helfer explain, "in the decade following *Pinochet*, courts and prosecutors across Europe and elsewhere have commenced criminal proceedings against former officials of other nations for torture and

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135 Fox, *The Law of State Immunity* at 680 (cited in note 1).

136 See note 137.

137 *Judgment*, 1 Trial Of The Major War Criminals Before The International Military Tribunal 171, 218 (1947).

138 Bradley and Helfer, 2010 Sup Ct Rev at 238–39 (cited in note 18).

other violations of *jus cogens*."[139] Again, a helpful way to conceptualize the interaction of these doctrines with current rules of foreign sovereign and official-status immunities would be that conduct-based immunity takes on a substantive nature in these types of cases. Thus liability for serious human rights abuses collides with and overcomes immunity, at least in criminal prosecutions. Put differently, international law has developed such that conduct-based immunity does not shield perpetrators of serious human rights abuses from criminal liability in other states' courts if those other states apply substantive international law.[140]

Admittedly, *dicta* in the ICJ's opinion in the *Arrest Warrant* case cut against this view. In passing on when immunity will not offer protection in foreign courts, the ICJ stated that one state's courts may try another state's former official "in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity."[141] This language implies that the only way around conduct-based immunity for former officials in respect of acts while in office would be if the acts were private in nature. For reasons already mentioned, creative categorization of what are really official acts as something else is problematic and tends to contradict other areas of international law, including the international law of immunity.[142] In this case, categorizing official acts that violate *jus cogens* as private would muddy the widely held distinction between public acts *jure imperii,* which entitle states to immunity, and private acts *jure gestionis*, which do not. Yet the dicta are curious and, as some have noted, "difficult to justify" in light of established state practice holding, for example, that no immunity attaches for military and other officials liable for international crimes.[143] Likely the best way around the *dicta* is that they are just that, *dicta*, and in any case should not be read as exhaustive so as to implicitly exclude development of state practice holding conduct-based immunity inapplicable to *jus cogens* violations for which individual liability exists under international law.

Another argument against viewing conduct-based immunity as substantive might try to make use of the legality principles outlined in the prior Sections of this Article. The argument would go something like this: if conduct-based immunity is substantive, then a post-conduct rescission of immunity—like a

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139 Id at 239.

140 As with exercises of universal jurisdiction, see note 41, I would insist that the override of immunity hinge on the faithful and accurate application of substantive international conduct-regulating law.

141 *Arrest Warrant of 11 April 2000*, 2002 ICJ at 25, ¶ 61 (cited in note 27).

142 See Section V.B.2.

143 Fox, *The Law of State Immunity* at 680 (cited in note 1).

waiver of immunity by a defendant's home state—could amount to a retroactive application of the law. But this argument does not hold up. It would hold only if conduct-based immunity were *already* established as a substantive bar to liability before other states' courts when the defendant acted. Yet that is the very question at issue. Put another way, imposing liability can only run afoul of legality if it were already established at the time of conduct that conduct-based immunity precluded liability. But because state practice and *opinio juris* have not yet combined to establish such a rule, classifying conduct-based immunity as substantive does not present legality problems. In short, if the law doesn't immunize defendants, defendants can't claim surprise that the law doesn't immunize them. In sum, as things stand there is conceptual and doctrinal room to classify conduct-based immunity as a substantive defense, thereby causing it to yield to charges of *jus cogens* violations in criminal prosecutions by foreign states.

2. Civil cases.

Although conduct-based immunity has given way to liability for *jus cogens* violations in criminal cases, "there has been less erosion to date of foreign official immunity in the civil context."[144] I have been skeptical of claims that there is, without more, something inherently different about the civil versus criminal context when it comes to the exercise of jurisdiction under international law.[145] Yet where state practice itself evinces a distinction between the civil versus criminal context, such arguments gain traction. Here state practice does appear to treat cases somewhat differently based on the type of suit.

The most prominent examples are probably the House of Lords opinions in *Jones v Saudi Arabia*.[146] The Law Lords relied explicitly on the disaggregation view of substantive versus jurisdictional rules to uphold immunity, viewing conduct-based immunity for state agents as largely equivalent to foreign sovereign immunity, which the Law Lords in turn accepted as "a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement."[147] Moreover, the Law Lords found the *Pinochet* ruling inapposite because it dealt with a criminal

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144 Bradley and Helfer, 2010 S Ct Rev at 240 (cited in note 18).

145 See Anthony J. Colangelo, *The ATS and Extraterritoriality, Part II: Universal Civil Jurisdiction and Choice of Law*, (Opinio Juris Mar 27, 2012), online at http://opiniojuris.org/2012/03/27/universal-civil-jurisdiction-and-choice-of-law/ (visited Apr 3, 2013).

146 129 ILR 629, 713 (HL 2006) (UK).

147 Id at 727, ¶ 24 (Lord Bingham); id at 732, ¶ 44 (Lord Hoffman) (both quoting Hazel Fox, *The Law of State Immunity* 525 (Oxford 1st ed 2004)).

prosecution as opposed to a civil case. Specifically, the Torture Convention argument that had been so central in *Pinochet* was deemed inapplicable to civil cases, and the UN Immunity Convention of 2004, which, though not in force, consciously "provides no exception from immunity where civil claims are made based on acts of torture" gained salience.[148] *Jones*, the UN Convention, and the fact that, as Bradley and Helfer's study notes, "a number of other jurisdictions have rejected a *jus cogens* exception to foreign official immunity in civil cases,"[149] tilt the current state of the law in favor of conduct-based immunity enduring for civil cases.

Incidentally, the United States appears to have bucked this trend somewhat. In particular, modern Alien Tort Statute (ATS) cases starting with the landmark case *Filártiga v Peña-Irala*[150] show US courts are willing to impose civil liability on foreign former state agents and officials. Yet many of these cases, including *Filártiga* itself—which involved claims against a former Paraguayan police inspector general[151]—cannot be said to squarely raise the immunity issue since either the foreign government never invoked immunity or waived it.[152] As Ingrid Wuerth has astutely observed, "[a] key step in understanding the customary international law of functional immunity today . . . lies in determining whether national court litigation in which immunity is not invoked or discussed nonetheless constitutes state practice or evidence of *opinio juris*."[153] Because, as Wuerth explains, forum states apparently have no obligation to confer immunity when it isn't invoked by a defendant's home state, there are good "reasons why these cases arguably do not demonstrate acquiescence in the erosion of functional immunity: the state entitled to raise immunity may not know about the case; it may successfully elect to contest jurisdiction rather than immunity; or it may actually favor (or at least not contest) the prosecution of its own national."[154]

The Fourth Circuit's most recent *Samantar* opinion did, however, squarely address whether conduct-based immunity yields to allegations of *jus cogens* violations, even though the defendant, and not his home state, raised the

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148 Id at 727, ¶ 26 (Lord Bingham); see also id at 733, 737, ¶¶ 46, 57 (Lord Hoffman).

149 Bradley and Helfer, 2010 S Ct Rev at 240–41 (cited in note 18).

150 630 F2d 876 (2d Cir 1980).

151 Id at 878.

152 Id at 889–90; see also, for example, *Mamani v Berzaín*, 654 F3d 1148, 1151 (11th Cir 2011) ("The United States government notified the district court that it had received a diplomatic note from the current government of Bolivia in which the government of Bolivia formally waived any immunity that defendants might otherwise enjoy.").

153 Wuerth, 106 Am J Intl L at 733 (cited in note 5).

154 Id.

immunity claims.[155] And the court came down firmly on the side of no immunity.[156] Yet both the Fourth Circuit's reasoning and its decision may prove vulnerable. As to the court's reasoning, and as noted above, the court relied intermittently on the implied waiver view that *jus cogens* violations cannot qualify as official conduct[157]—a view that has been strongly critiqued and that stands in tension with other, more settled areas of international law.[158] As to the decision itself, it may have limited precedential value since it can be preserved but distinguished from factually different cases in which recognized foreign governments formally request immunity. While not part of the court's *ratio decidendi*, the court noted that it additionally gave "substantial weight" to the rather unique circumstance—partially motivating the State Department's suggestion of no immunity—that "Samantar [the defendant] 'is a former official of a state [Somalia] with no currently recognized government to request immunity on his behalf.'"[159] Accordingly, although US courts have demonstrated a willingness to entertain civil suits against former foreign officials and state agents, the cases may not be very strong indicators of state practice and *opinio juris* either because foreign governments did not know of or challenge the immunity, or did not exist at the time of suit.

Perhaps the most promising feature of US law for those who argue against immunity for allegations of *jus cogens* violations is the procedural posture in which immunity is generally raised and treated. Domestic law immunities are generally viewed as affirmative substantive defenses. As a result, the defendant must raise and plead the immunity. As the Supreme Court held in *Gomez v Toledo*,[160] a section 1983 civil rights suit, "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant."[161] An interesting question becomes whether treating immunity as an affirmative substantive defense extends to international law immunities as well. As a historical matter, the answer appears to be yes, at least with respect to conduct-based immunities. Chimène Keitner has carefully shown that in early US cases "conduct-based (or *ratione materiae*) immunity was treated like an affirmative defense to be pleaded by

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155 *Yousuf v Samantar*, 699 F3d 763, 767 (4th Cir 2012).

156 Id at 778.

157 Id at 776 (concluding that "as a matter of international and domestic law, jus cogens violations are, by definition, acts that are not officially authorized by the Sovereign"); id at 777 (explaining the trend concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity).

158 See Section VI.B.2.

159 *Yousuf*, 699 F3d at 777.

160 446 US 635 (1980).

161 Id at 640.

the defendant" and "represent[ed] [a] substantive defense[] to be pleaded on the merits."[162] Keitner reveals through an extensive compilation of primary source materials that conduct-based immunity did not strip courts of jurisdiction in early US practice but rather embodied an affirmative substantive defense that was up to defendants to plead and prove.[163]

Modern cases are more opaque on the point. In *Samantar*, for instance, the Fourth Circuit indicated that foreign sovereign immunity is jurisdictional, quoting parenthetically a statement from the Restatement (Third) of Foreign Relations Law that "[t]he immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law."[164] The court then distinguished status-based immunity from conduct-based immunity on the basis that the latter "stands on the foreign official's actions, not his or her status," though the court also acknowledged that "conduct-based immunity for a foreign official derives from the immunity of the State."[165] A focus on the actions alleged, as opposed to the defendant's status, could signal a more merits-based substantive evaluation, but it also could simply mean that once it is determined that the acts were official and not private, the conduct-based immunity "derives from the immunity of the State."[166]

Yet the most telling aspect of the opinion in this regard was the court's rejection of conduct-based immunity for violations of *jus cogens*. The entire discussion had a very substantive tone, centering principally on the nature of the acts alleged. The court emphasized, for instance, that "[t]here has been an increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms—that is, they commit international crimes or human rights violations."[167] Here it was the substantive nature of the acts, as violations of *jus cogens*, which led the court to find no conduct-based immunity. Instead of invoking the implied waiver view that the acts were not official acts, as the court had done, the court would have been better off simply saying that the substantive prohibition on violations of *jus cogens* collided directly with the substantive defense of conduct based immunity, and the latter yielded.

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162 Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 NYU L Rev 704, 757 (2012).

163 See id at 716, 725, 737, 749, 758.

164 *Yousuf*, 699 F3d 763, 773 (4th Cir 2012) (quoting Restatement (Third) of Foreign Relations Law of the United States, part IV, ch 5, subch A, intro note).

165 Id at 774.

166 Id.

167 Id at 776.

VII. CONCLUSION

Immunities in international law expose multifaceted tensions between goals of international stability and legal accountability. This Article sought to clarify the law in this area by giving conceptual and doctrinal coherence to relationships between immunity and jurisdiction. It explained that foreign sovereign and status-based immunities are jurisdictional in the sense that they block the exercise of adjudicative jurisdiction by foreign states' courts. The Article also explained that these immunities do not, however, block the prescriptive jurisdiction of foreign states' laws to regulate conduct where a basis of prescriptive jurisdiction exists in international law. And, if the conduct at issue constitutes a universal jurisdiction offense under international law, all states have jurisdiction to apply substantive international law proscribing that conduct.

The Article then argued that this view of the relationship between immunity and jurisdiction makes sense on, and produces two important consequences for, the current state of the law: first, the relevant law-in-time for gauging these immunities is the law in existence when a court determines whether to entertain suit, not the law in existence at the time of the conduct underlying the suit; and second, this view avoids legality problems or the retroactive application of the law anytime a post-conduct trigger like a waiver or change in status removes immunity.

Finally, the Article assessed arguments that conduct-based immunity yields to claims of *jus cogens* violations. It explained that deeming conduct-based immunity a substantive, as opposed to a jurisdictional, defense provides a way for *jus cogens* prohibitions to come into direct collision with, and to overcome, immunity. But the strength of this argument varies with the type of suit. At present, state practice and *opinio juris* indicate that customary international law would receive this type of argument more favorably in criminal prosecutions than in civil suits.

The most important point of all, however, may be that the law in this area is in flux. At issue are perhaps the two most salient sets of norms modern international law knows: state sovereignty and the prohibition on violations of *jus cogens*. It is understandable to try to avoid clashes between them—and international law has largely done so thus far with respect to foreign sovereign and status-based immunities by classifying them as jurisdictional. Arguments equating conduct-based immunity to foreign sovereign immunity make conceptual sense. But they rely too much on analogy and what must at some level be false equivalences between the various immunities—immunities that international law itself tells us are different. The sincere international lawyer cannot so easily set aside actual state practice and *opinio juris*, which classify conduct-based immunity differently. On the other hand, arguments in favor of *jus cogens* trumping immunity are many. But they have been under attack and

have largely failed. So something new must be advanced or re-advanced in a way that can counter the prior rejection of these arguments. In my view, casting conduct-based immunity as a substantive defense is a promising way to do that. Going forward, should international lawyers and decision-makers argue that conduct-based immunity is a substantive defense that collides with, and yields to, prohibitions on *jus cogens* violations, state practice and *opinio juris* might accumulate toward forming customary law in this respect.